the court to some immaterial matter about which counsel possibly may be right, or which affords them more reasonable ground of argument than do the main contentions upon which this case must turn. As illustrating this, take for example the following, found on page 4. Speaking of the deed which the defendant in error was compelled to make to us as the result of the judgment in the specific performance case it is said:

"It appears by this record that the entire premises heretofore claimed by the Nine Hour owners was thus deeded back to them, and not any less part of it."

What possible difference could it make in this case whether the Nine Hour owners secured all, or less, or more than they claimed as being a part of their Nine Hour claim and wrongfully taken, or attempted to be taken from them by the owner of the St. Louis claim? Whatever may have been the contention of the parties in the district court of Montana, in the suit to establish an adverse claim, whatever area may have been claimed, or actually shown to be in conflict in those proceedings is wholly immaterial here, and has nothing to do with any issue before the court in this case. The parties to it, our respective predecessors in interest, settled this, and the one gave and the other accepted in satisfaction of their differences, the bond for a deed appearing as "Exhibit A," attached to our answer (Record 213, page 8), and thereafter that bond became the measure of the rights of the parties, and their successors

in interest to it. If the owners of the Nine Hour at the time of the making of this compromise had, as a matter of fact, surrendered the entire surface area embraced in the St. Louis claim, that fact would not have enabled us to have recovered an inch beyond the area embraced in the compromise ground. It is not the amount of ground surrendered, or not surrendered, that is made the consideration for the bond for the deed. It is the settlement and dismissal of the law suit, and the agreement to withdraw the adverse claim in the land office which is made the consideration of this instrument.

The assertion that it appears by this record that the entire premises theretofore at any time claimed by the owners of the Nine Hour has been deeded back to them is a complete *non sequiter*. Nothing of the kind appears. It was not a matter pertinent to any issue in the case; nevertheless the defendant in error has shown exactly the contrary of what it asserts to be the fact.

It has introduced in evidence a map of the premises called its "Exhibit A." On this map is shown the southwest corner of the Nine Hour lode, and the westerly line of that claim from that corner to the point of intersection of that line with what the defendant calls the south end line of its claim. On the northerly end, the northwest corner of the Nine Hour is shown, and the point where the westerly line of that claim intersects the east line of the St. Louis.

A line drawn between these two corners shows the west boundary line of the Nine Hour claim. This court will take judicial notice of the public land surveys and of the manner in which they are made. It will therefore take notice that in the surveying of a mining claim the land department requires that the claim shall be surveyed as originally located. If it is found that the survey thus made conflicts with the surface boundaries or survey of another and older claim, the surface thus in conflict will be excluded from the area conveyed, but nevertheless upon government plats and on all plats subsequently made of the ground, the lines will remain as originally surveyed and as the claim was originally located. It therefore does appear conclusively from the evidence in this case that the Nine Hour owners surrendered a very much greater area than was conveyed to them in the compromise ground.

Further illustration of what we mean is found in the fact that counsel throughout their brief seem anxious to draw us into some controversy regarding what we said by way of argument, or was contained in our briefs in the courts below. Apparently they think that when we have touched a subject we have exhausted it, and that we ought to be foreclosed from pursuing it further, or restating our position with reference to it in clearer or more emphatic language. An example of this is found at page 25 of their brief. They say:

"Plaintiff in its brief filed in the court below says:

"'Allegations of fact by the pleadings repugnant to the correct construction of the contract may be disregarded.' and at the top of page 21 authorities are cited to support this proposition."

If they have found such a proposition as this, in one of our briefs, and the authorities we have cited sustain our position, it is quite possible that it may be good law, and that they may rely upon it with safety. But the converse of this proposition is also true and allegations of fact by the pleadings not repugnant to the correct construction of the contract cannot be disregarded, as, for instance, in the case at bar. The complaint alleges that the plaintiff is not the owner of the compromise ground nor of the mineral therein contained, and that the defendant is the owner thereof. This allegation is in strict harmony with the correct construction of the bond, the judgment and the deed, and cannot be disregarded. Nor is there any good reason why these allegations of the complaint should be disregarded. The defendant in error made them deliberately and voluntarily, not as a mere recital of the contents of the bond or the deed, but as a statement of issuable facts which we were at liberty to admit or deny, as we might be advised. The pleading in which they are contained is duly verified by the oath of its manager, and we see no reason why these solemn allegations should be disregarded.

Again, we have somewhere inadvertently said that what

was or was not an end line of a mining claim could only be determined by ascertaining what line the lode actually crossed on its course or strike through the vein. Counsel seize upon this and argue with great earnestness and much show of learning, at page 38 and elsewhere through their brief, that we are in error, and that it is not necessary to entitle a vein to extralateral rights that it should pass through any line of the claim. We did not mean that before a vein could be accorded extralateral rights it must be actually demonstrated, as a physical fact, that its apex passed through the end line of the claim as located, and counsel knew, or ought to have known, that this was not our contention. We quite agree with Judge Lindley upon this proposition.

"If he establishes the existence of an apex, he is not compelled to show that it passes through his entire claim, crossing both end lines, or that it actually crosses either of them, so long as it does not appear that *it crosses the surface boundaries in such a manner as to deprive him of all extralateral rights.*"

2 *Lindley on Mines*, sec. 867, p. 1126.

The italics are ours, and they cover exactly the proposition which we have sought persistently to call to the attention of counsel, and which they have just as persistently refused to see. Their complaint shows that the Drum Lummon vein crosses the boundaries of their claim in such a manner as to deprive it of all *extralateral rights*. We fur-

ther claim that if they are entitled to extralateral rights by virtue of having, or being entitled to extralateral rights on their discovery vein, they have not pleaded any such vein, or any such rights, and therefore they must stand or fall on the extralateral rights possessed by the Drum Lummon vein. The innocence of counsel in this respect is shown by their contention that because extralateral rights were accorded to the vein, in the Del Monte case and in the Black Rock-Niagara case, that the defendant in error is entitled to extralateral rights on so much of the Drum Lummon vein as happens to lie within the surface boundaries of its claim, despite the fact that the only line of the claim crossed by the lode on its strike is the one it calls the east side line. Counsel close their eyes to the fact that in the Del Monte case, in the Black Rock-Niagara case, and in every other case where extralateral rights have been accorded to a vein passing out of the side line of a claim, the lode on its strike also actually crossed an end line of the claim as located. With a lode crossing a *side line* and an *end line* the latter affords a mathematical base from which a projected parallel line may be drawn down at the point of the departure of the lode through the side line, and these two lines will mark the boundaries of the plane through which the lateral rights of the vein may be pursued.

II.

Does the complaint state facts sufficient to constitute a cause of action?

Leaving these comparatively unimportant matters to take care of themselves we purpose reviewing, very briefly, the more serious discussions presented on behalf of the defendant in error. It is insisted with much pertinacity that because the bare averment of ownership is a sufficient allegation of title, in an action of ejectment, it ought to be good in an action of trespass. In some forms of trespass perhaps this might be true, but when you come to an action of the character attempted to be presented by this complaint the matter is quite different. When a miner leaves his own ground and invades the territory of an adjoining claimant, that moment every presumption of law and legal intendment which has been his shield while within his own limits abandons him and attaches to his neighbor whose territory he is thus invading.

"There is a presumption of ownership in every locator to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one else shall show, by a preponderance of testimony, that such deposit belongs to another lode having its top or apex elsewhere."

Leadville Co. v. Fitzgerald, 15 Fed. Cas., p. 101 (C. 8158).

Substantially to the same effect are the following:

Cheesman v. Shreve, 37 Fed. 36.

Oron S. M. Co. v. Campbell, 17 Col. 267.

Bell v. Skillicorn, 6 N. Mex. 399.

Doe v. Waterloo, etc., 54 Fed. 935.

Jones v. Prospect M. T. Co., 21 Nev. 399.

He must therefore show his right to be there not only by strict proof, but by strict pleading as well. Counsel, p. 20 of their brief, refer to our quotation from the opinion in *Cons. Wy. G. M. Co. v. Champion M. Co.*, 63 Fed. 540, and exclaim exultingly:

"His honor, Judge Hawley, does not say until you allege."

This probably draws the line of our dispute a little more sharply. The contention of counsel for the defendant in error is that they may prove material issuable facts without pleading them. We, on the other hand, contend that to admit the proof there must be found appropriate allegations in the pleadings. The question we have to deal with is one strictly pertaining to the pleading. Our objection made at the beginning of the trial was, in effect, a demurrer for want of sufficient facts to constitute a cause of action. The circuit court was then called upon to determine, as a question of law and unaided by the proof, of a solitary fact whether the complaint stated a cause of action. This court,

in passing upon this question, will now regard it from the same point of view which the circuit court occupied when it was compelled to pass upon it. This court must take the pleading and from its contents, wholly unaided by any outside information, determine whether between the four corners of it there are facts stated which, if proven, will constitute a cause of action. It will be seen at a glance that but one vein is referred to in the pleading, and that vein passes in and out of the claim, through the same boundary line. Now, whether it be the discovery vein, or as counsel term it, a by vein, it seems to us that standing by itself it can have no extralateral rights. The supreme court of Colorado and Judge Lindley are too clearly right about this to make it worth while to discuss it. It is therefore a clear proposition that if the Drum Lummon vein in the St. Louis surface has any extralateral rights it is because of something outside and independent of its own existence there and passage through the ground. It is because there is a discovery vein within the surface boundaries of the St. Louis claim upon which its owner is entitled to claim extralateral rights to the same extent and in the same direction as it is claiming them upon the Drum Lummon. Now, in the absence of all allegations with reference to the discovery vein and its rights, how is the court to say that this pleading is sufficient as a question of law? How can it be held that a pleading states a cause of action or a defense in the absence of all allegations of fact necessary to appear

on its face to enable the court to determine whether it does so or not.

Nor are these allegations of mere probative matters embraced in the plaintiff's allegation of the ownership of the St. Louis claim, as is vaguely contended by the defendant in error. It may be, as it is, the undisputed owner of the St. Louis claim, and for that matter of the Drum Lummon vein within the St. Louis surface. This may all be true, and yet the discovery vein of the St. Louis may run across the claim so as to pass on its strike through what have been denominated the side lines of the claim, in which event the owner of the St. Louis vein would not be entitled to extra-lateral rights on the Drum Lummon, or, if the course of the St. Louis vein is substantially in a northerly and southerly direction, it may dip to the west, in which event there would no right to pursue the Drum Lummon vein on its dip to the east.

These are material and issuable matters which, if denied and not established by the plaintiff on the trial of the case, would result in a judgment against the plaintiff. The line of distinction between what are issuable matters and what are probative matters is not always very clearly drawn. The late lamented Justice Field, when chief justice of the supreme court of California, had occasion, in the case of *Green v. Palmer* (15 Cal. 411), to examine a complaint which was not, like the complaint in the case at bar,

"a model of perfection." In this opinion he quotes with approval from a manual written by one of the commissioners engaged in framing the New York code; and, among other rules thus stated, after pointing out the difficulty which sometimes arises in determining what are issuable and what are probative facts, he quotes the following:

"The following question will determine in every case whether an allegation be material: 'Can it be made the subject of a material issue?' In other words, 'If it be denied, will the failure to prove it decide the case in whole or in part?' If it will not, then the fact alleged is not material; it is not one of those which constitute the cause of action, defense or reply."

Green v. Palmer, 15 Cal. 411-416.

Substantially the same rule is laid down by Judge Bliss, in his excellent work on Code Pleading. He says:

"The pleader may sometimes be enabled to decide whether a fact is evidentiary merely, or an ultimate one to be pleaded, by inquiring whether the denial of such fact would make a material issue—whether if the denial be sustained the defendant may not still be liable."

Bliss on Code Pleading, Sec. 206.

Applying this rule to the case at bar, can there be any doubt of the proposition, that if it were found that the discovery vein on the St. Louis ran in an easterly and westerly direction, so that it would cross the alleged side lines of the claim, that there could be no extralateral rights claimed on the Drum Lummon vein within that claim. Or if,

as suggested by them, it dipped to the east, while the Drum Lummon vein dipped to the west, the right of pursuit would unquestionably be lost.

III.

A COMMON LAW DEED.

The learned counsel for the defendant in error have much to say in their brief about a common law deed and a common law construction of the bond, the judgment and the deed in the specific performance case, and they ingeniously argue that, because extralateral rights are given under the Mineral Land Act of May 10, 1872, a deed for a mining claim should have some different construction given to it than a deed or other contract in writing relating to other classes of land, or to other matters. It is vaguely hinted that, either under the Mineral Land act, or some other act of congress, there is authority for the distinction which they seek to draw between what they term a common law deed and a mining deed. We know of no provision in any act of congress providing for the construction of an instrument relating to mining claims, in any different manner from that applied to every other instrument pertaining to the transfer of property; and, so far as the decided cases go, there is not an expression in any one of them which would warrant the conclusion that the slightest difference is to be made between the construction of such instruments

and instruments of like character, but relating to other classes of real estate. The language used in the mining deed, like that used in any other contract between parties competent to contract, is to be determined, where there is any ambiguity in the language used, by an inquiry as to what was the intention of the parties. Where, as in the case at bar, there is no ambiguity whatever, there is no room for construction in one case any more than in another. In each case precisely what is included within the instrument will pass to the grantee, and that which is not included, or which in the instrument itself is reserved, remains in the grantor. If the grantor says in his deed to a mining claim, or a portion of it, that he conveys all mineral therein contained, the court, as in the specific performance case, must take him at his word and hold that he is bound by his deed, and that whatever he has conveyed by plain and unmistakable language, he has not retained and is not possessed of, after the execution of his deed. Counsel for the defendant in error pretend to find some support for their contention in the Del Monte case, but they do not quote a syllable from that decision which tends to support them at all, nor is there anything to be found in the decision which would have that effect. To assure ourselves that this is so, we need not look further than to the statement of facts made by the court, from which it will appear that there was no deed or contract of any character involved in this litigation.

IV.

THE ANSWER.

Since we are attacking their complaint, counsel seem to think that they will be justified in carrying the war into Africa by attacking our answer for the first time in this court. They say, on page 23 of their brief:

"If the answer admits the title of defendant in error to the mineral in the vein, lode or ledge in question, in so far as it has its apex inside the surface boundaries of the St. Louis lode claim, notwithstanding it has dipped beneath the compromise strip, then the affirmative allegations of the answer must be reconciled with this admission, or else there is a *fatal repugnancy of a very malignant character.*"

This lies, they say, in the fact that we have admitted their title to the St. Louis, as alleged in the second paragraph of their complaint, and then denied the right to pursue the Drum Lummon vein into the compromise ground and the Nine Hour claim. They assert that this admission and denial are inconsistent, the one with the other, and they cite an authority from the supreme court of Oregon to the effect that the affirmative allegation should be stricken out.

To this contention there are two answers. In the first place, if it were absolutely good, and if there was in fact an inconsistency between the two, counsel could not raise it for the first time in this court. If there was anything in

it, they should have demurred to our answer, or have moved to strike, and by replying to it, instead of taking some action to purge it they have waived all right to complain of it. On page 31 they quote Section 685 of the Code of Civil Procedure of the State of Montana, which clearly shows that, however great the repugnancy might be it is too late for them to urge it now.

But if counsel will look a little closer into our answer they will find that, while it may not be a "*model of perfection*," it is not the malignant monster which they apparently fear it is. What is it we have admitted in paragraph 4 of our answer? First, the corporate character of the respective parties to the suit, as alleged in paragraph 1 of plaintiff's complaint; second, that it is the owner of the St. Louis lode mining claim, and of the quartz, rock and ore and precious metals contained therein, "save and except that portion thereof known as the thirty foot strip, or compromise ground, * * * together with all mineral contained therein;" third, that the compromise ground aforesaid and the Nine Hour lode are the property of this plaintiff in error. The answer is absolutely harmonious, absolutely consistent, and so is the complaint. Counsel have the mistaken idea that we are attacking their complaint because of some ambiguity contained in it, and insist that if there was any objection to it upon this ground it should have been taken by demurrer. There is no ambiguity in the complaint. It alleges the exact facts. The de-

fendant in error is the owner of the St. Louis mining claim and of all the mineral and precious metals therein contained, save and except the compromise ground and the mineral therein contained, which is the property of the plaintiff in error, just as is alleged in the complaint. The only inconsistency there is between the admissions, denials and new mater set up in the answer is that, inasmuch as no claim is made in the complaint to the mineral contained in the compromise ground, it was probably unnecessary to plead the judgment in the specific performance case as an estoppel; but the rule of pleading is, that where a party relies upon anything as an estoppel he must plead it at the first opportunity to do so, or he waives it. We chose not to rely upon the admissions and averments found in the plaintiff's complaint, but to set up our estoppel and plead it affirmatively. The complaint avers what are the exact facts, as is disclosed by the record. It does own the St. Louis claim, and no denial of that fact would have availed us anything. We, on the other hand, do own the compromise ground, together with the mineral therein contained, and this fact the defendant in error not only affirmatively alleges but is estopped from denying, and is by the judgment in the specific performance case perpetually enjoined and restrained from ever claiming "all interest or claim to the said premises, or to any part or portion thereof, or to the possession of the same or any thereof."

V.

WHERE THE APEX OF A VEIN CROSSES INSIDE AND OUT OF A CLAIM THROUGH THE SAME BOUNDARY LINE, MAY IT HAVE EXTRALATERAL RIGHTS?

Counsel argue at considerable length that if the Drum Lummon vein were in fact their discovery vein, which they are careful to assure us it is not, that—even in that case—it would be entitled to extralateral rights, because it traverses their claim for some distance in a direction more or less parallel to the line they deem the east side line of their claim. They cite several authorities which they profess to think support their contention. We cannot find a word in either one of the cases referred to which recognizes the right in the remotest degree. We therfor purpose leaving this question without further discussion. To us, the reasoning contained in Catron v. Old, 23 Colo. 433 (48 Pac. Rep. 687) is simply unanswerable, and we leave this question to be determined by the court as between the gentlemen on the other side and the supreme court of Colorado.

VI.

ESTOPPEL.

We now reach the question which apparently gives counsel on the other side more concern than anything else in the case, as they have devoted 55 pages of their very excellent brief to its discussion. They start out by rearguing the proposition already fully discussed that they have extralateral rights on the Drum Lummon vein, though it passes in and out of the same boundary line of the claim, and although there is no discovery vein within such surface boundaries having extralateral rights to the same extent, and in the same direction as those claimed for what they term a "by," or other vein. Having reached a conclusion satisfactory to themselves on this question, they proceed to examine the effect of the deed on the right of the defendant in error as the owner of the St. Louis claim to pursue the Drum Lummon vein into the compromise ground. Ignoring the fact that this deed is in fact a part of the judgment in the specific performance case, and that in its execution the parties to it manifestly could have had no intention whatever which could serve as a guide to its interpretation, they proceed to inquire what was the intention of the parties to it at the time of its execution. They absolutely refuse to accept our view of the situation, that the estoppel is one that arises more from the judgment than from the

deed, although perhaps this may be a distinction without a difference. If a party is estopped from doing a certain thing, it is probably a matter of little concern whether such estoppel arises from one cause or another. They in a measure recognize that canon of construction which declares that, where the language of the instrument is plain and unambiguous, it is the duty of the court to give it effect according to its plain intent and meaning, and that there is no room for construction, and to this end they quote from the printed matter usually contained in blanks for mining deeds (see defendant in error's brief, page 46), and they claim it is possible to attribute more than one meaning to some of this language. This form of deed has been in use in California, Montana, and other mining states, for a good many years, and if there is any ambiguity about this language, that fact does not seem to be determined by any adjudicated cases in courts of the states where such deeds have been in use. Just what this ambiguity is we do not clearly gather from the inquiry made by counsel. "Was it intended," they ask, "to convey by vertical lines, as in the case of agricultural lands, or was it intended to convey only such ores as the Nine Hour claim would have been entitled to had there not been a wrong survey across a part of its area, or was it intended to convey that which wholly or in part apexed within said claim?" What the language quoted from the deed has to do with these inquiries is past our comprehension. To us it is clear that, by the terms of

the bond executed by their predecessor in interest to our predecessors in interest, it was expressly stipulated that, upon the procurement of patent, he would convey to them the compromise ground, together with all mineral therein contained. That, by the judgment requiring the specific performance of this contract, the defendant in error was compelled to convey to us the compromise ground, together with all mineral therein contained, the latter being expressly mentioned in the deed as a part of the description of the specific property to be conveyed. And not only this, but by the judgment and deed referred to, it was compelled to and did convey to us "all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part of, in or to the said premises, and every part and parcel thereof, with all of the appurtenances" (record 213, page 11). To say that this plain, emphatic language is capable of two constructions, or that having made such a deed the defendant in error has yet an interest of any kind or character in the compromise ground, seems to us so absurd as not to be worthy of serious discussion.

It will be noted that the words quoted at page 46 of defendant in error's brief, from the deed, do not appear in the original bond (Exhibit A, attached to defendant's answer.) The situation and intention of the parties at the time of the execution of this bond is the only subject en-

titled to be considered as bearing upon the construction of any of these instruments. For some reason counsel for the defendant in error ignore this bond completely, and we are invited solemnly to a consideration of what were the intentions of the parties to the deed at the time of its execution, and authority after authority is cited to prove to this court that, where there is anything in a deed or other written contract which is ambiguous and requires construction it is proper for the court to sit down as nearly as may be, in the seats which the parties occupied when they made it. This is so nearly common knowledge that almost every intelligent layman understands it, and there was no use in citing a single case or quoting a syllable from any decision to establish such a perfectly clear proposition. We do not purpose being beguiled into a controversy with counsel on the other side over a proposition so elementary and so thoroughly well established; but we cannot refrain from saying that we know just as well as they do that all of this show of learning is a mere pretense for the purpose of turning away attention here from the poverty of their case.

We cheerfully yield acquiescence to the doctrine for which they contend, and say that, in a proper case—where there is something ambiguous to be construed—this is the first canon of construction, but we also say that it has no place in this case. In this case there is absolutely nothing to construe, either in the bond, the judgment or the deed.

Each and every of these documents is couched in such plain unmistakable language that there is no chance for any controversy or two opinions about it. Joining hands, however, with our adversary, and going in quest of the intention of the parties to this deed at the time it was made, we find it was not the intention of the grantor to convey us anything, either of the surface or of the mineral rights in the compromise ground, if it could possibly avoid doing so. On the other hand, it was the intention of the grantee to get both the surface and all of the mineral under the surface, in exact conformity with the calls of its bond and the judgment of the court. What is there therefore to construe, since we have here clearly and unmistakably the intention of the parties to this deed. We find further that a court of competent jurisdiction inquired carefully and patiently into the intentions of the parties to the bond at the time it was made, and the deed is the result of its deliberate judgment as to what those intentions were. A final judgment of this character ought to be the end of the law, but here counsel for defendants in error and ourselves are at issue. We say the judgment rendered in the specific performance case was a final adjudication of all of the issues involved in the pleadings in that case; they contend that, in the case at bar, they were entitled to reopen this judgment. On pages 46-7 of their brief they say

"Of course that evidence must consist in proving the peculiar circumstances under which the survey was made,

the controversy in the land office between the parties, the contention in court which was the result of the controversy in the land office, and the contract made in compromise of that controversy, and the suit thereon."

The most casual reference to the judgment roll in the specific performance case will show that we fought every one of these questions out in that case, and that every one of them was solemnly decided in our favor. Must we again "thresh over this old straw," or may we go into court and rely upon what was adjudged in the former controversy?

Having thus cited all of the authorities that could be conveniently found, and having quoted elaborately from each to establish a proposition which they knew we would not dispute, and which they knew it would not do us any good, either in this court or elsewhere, to dispute, they reach the startling conclusion (brief, page 52):

"That the St. Louis did not deed, and therefore reserved, all the rights it would have had had the claim been surveyed originally to and including its present boundaries. That was the intent of the parties."

If this is true, if counsel are right about this, it is most surprising that in the bond for a deed some word was not said from which this intent could have been gathered, and it is equally surprising that, by the language employed, they said exactly the contrary to what they intended. In support of this, they say the records of the specific performance case is filled with statements that this strip was

to be considered as part of the Nine Hour claim, and not as an independent purchase or conveyance. It is not material what this strip then was or had formerly been, or what it was to be considered to be. It does not matter whether it was, as they contended in the specific performance case, always a part of the St. Louis claim, as originally located, or as they now contend in this case, always a part of the Nine Hour claim, as located. The plain unvarnished facts are that the predecessors in interest of the parties to this controversy had an action in a court of competent jurisdiction; they compromised it; our predecessors in interest agreed to dismiss their suit and withdraw their adverse claim in the land office, so that their predecessor in interest might obtain a patent for his St. Louis mining claim, and he agreed, in consideration of their doing so, that as soon as he obtained his patent he would deed to them this compromise ground, together with all the mineral therein contained, without any reservation or exception whatever, and that is all there is to it. It does not matter whether the deed was upon the blank form usually used for conveying mining property or upon a form used for the conveyance of any other character of real estate. In every case the intention of the parties and the character and nature of the transaction would have to be determined from the instrument which they used in executing it. Suppose the deed conveyed all mineral below a certain level in the mine, or all mineral lying north of or east of, or in any

other direction from, a given line or place in the claim, or all mineral in any specified piece or parcel of it, could the defendant in error be heard to say it did not mean all the mineral in that ground, but only intended it to be a specified portion of it? Counsel would have us believe that when you are talking about a mining claim, all does not mean all as the lexicographers understand that word. Although your deed says all the mineral, it does not mean all, but only a very small part of it. Let us not pursue this further. This part of the argument in their brief is as transparently thin as the other portion which undertakes to establish the fact that where there is an instrument so ambiguous as to need construction you must ascertain the intention of the parties to it, so as to ascertain its meaning.

Before passing from the consideration of this portion of the brief we want to call the court's attention to another matter along the same lines as those we have just been discussing. Counsel there say:

"By the pleadings and findings it is demonstrated that the strip always was a part of the Nine Hour, and that under the covenant defendant held the pure legal title in trust, and that the intention was to convey and restore it to the beneficiary of the trust, *and not to convey any right or interest of the trustee in his own individual property.*"

A very considerable number of very respectable authorities, among which is one decision from this court, are cited as sustaining this doctrine. To our way of thinking, how-

ever, the quotation just made is as fine an example of begging the question as can be found in any treatise on applied logic. Whose property was it? Is the mineral contained in the compromise ground the property of the plaintiff in error or of the defendant in error That is the question? We have a deed for it, made in pursuance of a judgment of a court of competent jurisdiction, which decided that we were the owners of it, and compelled the defendant to execute a deed for it to us. Shall we have the benefit of the judgment rendered in our favor after a full and patient trial of the cause, or are the judgments of Montana courts not entitled to the full faith and credit guaranteed by the constitution of the United States to judgments of all courts of competent jurisdiction? From all of these authorities, counsel draw a conclusion very satisfactory to themselves, on page 78 of their brief, as follows:

"So here, by examining the pleadings, covenant and findings, it will clearly appear that the judgment was intended to cover, and *could only cover* the trust property, i. e., the strip of the Nine Hour claim, being all that was involved in the litigation."

If this conclusion is warranted by the law and the facts, we think counsel have been remiss in their duty to their clients. If the words "together with all the mineral therein contained" did not embrace anything involved in the controversy, they should not have been inserted in the judgment; counsel should have objected to the insertion of

that language in the judgment; and, if the court arbitrarily inserted the words they should have brought it to the attention of the appellate court and had it corrected, either in the supreme court of Montana, or in this honorable tribunal, when the case was here. If these words, which under the rules of construction must have some meaning attached to them, meant nothing and conveyed nothing, they had no place in the deed and ought to have been expunged therefrom. Our contention, on the other hand, is that these words must be given effect according to their plain intent and purpose, as understood by the parties to the bond and as found by the court in the specific performance case.

A word with reference to the case of *Stinchfield v. Gillis*, 96 Cal. 400; 107 *idem* 86, cited in our brief on the motions, and we have done with this branch of the case. Counsel quote liberally from the opinion in this case, and say that the case does not sustain our contention. We cite this case for the purpose of showing that the grantor of a mining claim, or an interest therein, may be estopped by his deed, precisely as the grantor of any other character of real estate may be estopped by his deed. In other words, that there is no distinction between a "common law deed" and the deed of a mining claim, except in the fertile imagination of counsel. The deed of Gillis to the plaintiff in that case—an ordinary bargain and sale deed—was held to es-

top him from claiming gold, which, under the provisions of Section 2336, *U. S. Rev. Stats.*, would have most unquestionably been his, but for the estoppel created by his deed, just exactly as the gold in the compromise ground in all leads apexing within the surface boundaries of the St. Louis would be its property but for the estoppel created by the judgment in the specific performance case. A writ of error was sued out by Gillis and the case brought to this court (159 U. S. 658). It was dismissed for want of jurisdiction, and Mr. Chief Justice Fuller, speaking for the court, uses this language:

"It is, however, contended that the record shows that a federal question arose in the case, as considered by both the superior and supreme courts, and was decided adversely to plaintiffs in error, namely, that Gillis had the right to follow what was known as the Rice vein, which had its apex on the Carrington mine, upon its dip, beneath the surface of the Pine Tree mine, and to appropriate to his own use the gold found in the vein at the point of its intersection with the socalled west vein, which had its apex on the Pine Tree mine, because the Carrington was the older or prior location; and that this could only be determined by an application of Sections 2322 and 2336, Revised Statutes. But the decision of the supreme court was clearly based upon the estoppel deemed to operate against the plaintiff in error, upon general principles of law and the statutes of California in respect of such a conveyance as that to Stinchfield irrespective of any federal question. And this was an independent ground broad enough to maintain the judgment. The writ of error must therefore be dismissed."

If the contention of the defendant in error is valid, that an estoppel by deed cannot be created where the property conveyed is an interest in a mining claim, then we respectfully submit that the decision of this court in *Gillis v. Stinchfield* was wrong. The court should have held that the deed was incapable of creating an estoppel, as against the plaintiff in error claiming a right which was granted to him under the mineral land act. That the deed must be construed with reference to the "peculiar property" which it was sought to convey, and that the common law doctrine of estoppel did not apply to this character of a case. And if the theory of counsel for the defendant in error is right and is the law, here was the clearest sort of a federal question presented on this record. Either counsel are wrong, or this court was wrong in *Gillis v. Stinchfield*. The two theories cannot be reconciled.

OTHER CONTENTIONS.

Counsel for defendant in error seem to have exhausted themselves on the subject last considered, and they pass the other controversies presented in this case with very little discussion. While we have not treated these other matters as fully in our brief on the merits as we might have done with advantage, we will leave the discussion where the defendant in error has left it, and content ourselves with what we have said in our former brief. There seems to be some claim made in the brief that as to some of these

points they are to be treated as abandoned by us, because we did not press them with that vigor and earnestness in the lower courts which we ought to have done. It may be that this is the reason that we have been defeated in two courts in a case that seems to us to be so absolutely plain and clear. Our desire not to fail for the same reason in this court must be our apology for troubling it with so many briefs. We feel that the judgment in this case is so outrageously unjust that a failure to secure a reversal, due to any want of earnest effort on our part, would be little short of criminal negligence.

Respectfully submitted,

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